LIBRARY
SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
MAY 15 1971
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. ~~1712~~ 70-173

ALUMINUM COMPANY OF AMERICA, ET AL.,
Petitioners,

v.

WOODS EXPLORATION & PRODUCING COMPANY, INC., ET AL.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JOHN LEROY JEFFERS
First City National Bank Building
Houston, Texas 77002

Attorney for Petitioners Aluminum Company of America, Crown Central Petroleum Corporation, Lavaca Pipeline Company

Of Counsel:

ROSS N. STERLING
ROBERT E. MOSER, JR.
CHARLES T. NEWTON, JR.
VINSON, ELKINS, SEARLS & SMITH
First City National Bank Building
Houston, Texas 77002

FIDELITY PRINTING COMPANY, INC., HOUSTON

TABLE OF CONTENTS

	Page
Opinions below	1
Grounds of Jurisdiction	2
Questions Presented for Review	3
Statutes Involved	4
Statement of the Case	6
Reasons for Allowing the Writ	14
Argument	15
I. The Decision Below Permitting Antitrust Recovery for Government Action and Inducing Government Action Conflicts with Decision of this Court and those of the Courts of Appeals for the Fourth and District of Columbia Circuits	15
II. Piecemeal Retrial of Damage Issues Based Upon a Holding as a Matter of Law That the Appling Field is the Relevant Market Requires Supervision and Review	24
III. Fragmenting the Case into Three Parts and Remanding Two Parts for Separate Trial Denies Petitioners a Jury Trial on the Whole Case and Constitutes Such an Abuse of Established Judicial Practice and Procedure as to Require Supervision and Review	28
Conclusion	31
Certificate of Service	33

LIST OF AUTHORITIES

Cases

Association of Western Railways v. Riss & Co., 299 F.2d 133 (1962)	14
Benz-Stoddard v. Aluminum Company of America, 368 S.W.2d 94 (Tex. 1963)	2, 9
Carter v. American Telephone & Telegraph Co., 365 F.2d 486 (5 Cir., 1966)	22
Case-Swayne Co. v. Sunkist Growers, Inc., 369 F.2d 449, 456, 459, cert. denied on monopolization issues, 387 U.S. 932 (1967)	27

	Page
Eastern Railroad Presidents Conference v. Noerr, 365 U.S. 127 (1960)	11, 14, 17
Gas Light Co. of Columbus v. Georgia Power Co. and The Southern Co., Slip Opinion dated March 23, 1971, No. 506 ATTRR-1	20
Magenau v. Aetna Freight Lines, Inc., 360 U.S. 273, 279 (1959)	29
Okefenokee Rural Electric Membership Corp. v. Florida Power & Light Co., 214 F.2d 413 (5th Cir. 1954)	14, 19
Parker v. Brown, 317 U.S. 341 (1943)	11, 14, 16
Railroad Commission v. Aluminum Company of America, 380 S.W. 2d 599 (Tex. 1964)	2, 9
Railroad Commission v. Woods Exploration & Producing Co., Inc., 405 S.W. 2d 313 (Tex. 1966)	2, 9
Standard Oil Co. of California and Standard Stations v. United States, 337 U.S. 293, 299 (1949)	27
United Mine Workers v. Pennington, 381 U.S. 657 (1965)	11, 14, 19
United States v. Grinnell Corp., 384 U.S. 563, 571 (1965)	26
United States v. Rock Royal Co-Op, Inc., 307 U.S. 533 (1937)	11, 14, 16
Washington Gas Light Co. v. Virginia Electric & Power Co., No. 14,605, Slip opinion dated February 12, 1971, 1971 CCH Trade Cases ¶ 73,469	14, 22
Woods Exploration & Producing Co., Inc. v. Aluminum Company of America, 284 F. Supp. 582 (S.D. Tex. 1968)	1
Woods Exploration & Producing Co., Inc. v. Aluminum Company of America, 304 F. Supp. 845 (S.D. Tex. 1969)	1
Woods Exploration & Producing Co., Inc. v. Aluminum Company of America, Nos. 28763 and 29487, Slip opinion dated January 5, 1971, 1971 CCH Trade Cases ¶ 73,422	2

Statutes

Clayton Act, Section 4, 15 U.S.C.A. 15	5
Clayton Act, Section 4B, 15 U.S.C.A. 15b	5, 29
Sherman Act, Section 1, 15 U.S.C.A. 1	5
Sherman Act, Section 2, 15 U.S.C.A. 2	5
Art. 6008, Tex. Rev. Civ. State. Ann.	5, 24
28 U.S.C. § 1254 (1)	2

In The

Supreme Court of the United States

October Term, 1970

No. .....

Aluminum Company of America, et al,
Petitioners,

v.

Woods Exploration & Producing Company, Inc., et al,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

OPINIONS BELOW

The trial court in this antitrust treble damage action delivered two opinions which are involved in this petition. The first, *Woods Exploration & Producing Co., Inc.*, v. *Aluminum Company of America*, 284 F. Supp. 582 (S. D. Tex. 1968), granted a partial summary judgment to Petitioners (Defendants) on a cause of action based on natural gas production allowables claimed to have been fixed too low by the state government agency under the state statutory regulatory scheme because of Petitioners' representations to it. Appendix p. 1.[1] The second, *Woods Exploration & Producing Co., Inc.* v. *Aluminum Company of America*, 304 F. Supp. 845 (S. D. Tex. 1969), rendered

---

[1] Because of the length of the opinions below and related matters a separate Appendix has been prepared pursuant to Rule 23(i) of this Court.

judgment for Petitioners on the remainder of the case. Appendix p. 25. The United States Court of Appeals for the Fifth Circuit reversed in *Woods Exploration & Producing Co., Inc.* v. *Aluminum Company of America,* Nos. 28763 and 29487, Slip Opinion dated January 5, 1971, 1971 CCH Trade Cases ¶ 73,422.[2] Appendix p. 38. Rehearing was denied per curiam by the Court of Appeals on March 17, 1971, Nos. 28763 and 29487, Slip Opinion dated March 17, 1971. Appendix p. 96.

Although not strictly "companion cases", three decisions of the Supreme Court of Texas are an integral part of the controversy between the parties and are keys to determining the errors in the grounds of the judgment of the Court of Appeals. *Railroad Commission* v. *Woods Exploration & Producing Co., Inc.,* 405 S.W.2d 313 (Tex. 1966), Appendix p. 97; *Rauroad Commission* v. *Aluminum Company of America,* 380 S.W.2d 599 (Tex. 1964), Appendix p. 131; *Benz-Stoddard* v. *Aluminum Company of America,* 368 S.W.2d 94 (Tex. 1963), Appendix p. 140.

GROUNDS OF JURISDICTION

The opinion of the United States Court of Appeals for the Fifth Circuit from which this petition is brought was issued on January 5, 1971. A petition for rehearing and for rehearing en banc was denied on March 17, 1971. No extension of time for the filing of this petition has been sought. Jurisdiction is conferred upon the Court by 28 U.S.C. § 1254(1).

---

[2] No. 28763 involves an injunction against Respondents' proceeding to relitigate this case in state court after entry of final judgment in the federal court. Separate appeals on the injunction and the merits were taken by Respondents and consolidated by the Court of Appeals. Petitioners seek no review in No. 28763.

QUESTIONS PRESENTED FOR REVIEW

1. Whether the antitrust laws of the United States provide a treble damage recovery for injury alleged to have resulted from limitations placed upon Plaintiffs' production of natural gas from a Texas natural gas field where the limitation upon such production is imposed by orders of the Railroad Commission of Texas in the exercise of its lawful governmental authority to regulate natural gas production in Texas.

2. Whether the antitrust laws of the United States provide a treble damage recovery on allegations that the Defendants, joint owners of the major portion of a Texas natural gas field, in combination furnished false information to the Railroad Commission of Texas to procure orders from the Commission which would restrict the production of Plaintiffs, when the Plaintiffs sought no relief from the Commission, the Commission in fact ignored the allegedly false information and had full knowledge of the conditions and results of its regulations in the natural gas field involved, and the Plaintiff produced all of the gas from the field which the Commission permitted Plaintiff to produce.

3. Whether a single, small natural gas field in Texas may be determined as a matter of law to be a relevant geographic market for determining the existence of a monopoly, conspiracy to monopolize or attempt to monopolize under Section 2 of the Sherman Act, 15 U.S.C. §2, where all of the evidence is undisputed that the gas produced from the field is not marketed in the field but is marketed in another and much larger area in competition with quantities of gas from other fields vastly exceeding the amount produced from the field involved.

4. Whether reinstatement in an antitrust treble damage action of the verdict findings on liability issues and

damages to the Plaintiff as final on the evidence admitted before the jury as to *part of the case* and remanding for separate trial on the liability and damage issues on *two other parts of the case* is impermissible procedure denying the Defendants a jury trial of liability and damage issues *on the whole case* when:

A. The liability and damage issues were submitted by the trial court *as being on the whole case* but the Court of Appeals has reinstated the jury findings as final as to *one evidentiary part of the case* and reversed and remanded *two other evidentiary parts of the case* for separate trial on both liability and damage issues.

B. The *first part* to be tried was covered by a now reversed and remanded partial summary judgment granted before trial on gas production allowables allotted Plaintiffs by the state regulatory agency allegedly influenced by Defendants' representations to the agency which resulted in exclusion at trial of evidence of judicially binding fact findings by the state courts of drainage by Plaintiffs of vast quaitities of Defendants' gas so that such evidence was not before the jury in arriving at the damage findings now reinstated as final.

C. The *second part of the case* remanded for separate trial relates to a liquid extraction plant Plaintiffs desired to build as entry into a new business for which there was no evidence of their preparedness to enter beyond a purported contract which the jury found to be a forged instrument and which extraction plant Plaintiff never alleged as a part of the case until more than four years after the failure of the plant plans.

STATUTES INVOLVED

Plaintiffs-Respondents brought this action under Sections 1 and 2 of the Sherman Act 15 U.S.C. § § 1 and 2;

Section 1:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . . ."

Section 2:

> "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor . . . ."

and Section 4 of the Clayton Act, 15 U.S.C.§15;

> "Any person who shall be injured in his business or property by reason of anything forbidden in the anti-trust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

Other provisions and statutes involved are Section 4B of the Clayton Act, 15 U.S.C. § 15b;

> "Any action to enforce any cause of action under Section 15 or 15a of this title shall be forever barred unless commenced within four years after the cause of action accrued";

and Art. 6008, Tex. Rev. Civ. Stat. Ann., governing regulation of production of natural gas by the Railroad Commission of Texas. Pertinent provisions of this Article are printed at Appendix p. 147.

STATEMENT OF THE CASE

This civil antitrust treble damage case revolves around the operations of the Petitioners-Defendants[3] and Respondents-Plaintiffs[4] in a single natural gas field located on the middle coast of Texas adjacent to the Gulf of Mexico. The field in question, known as the Appling Field, comprises approximately 4,000 acres on the earth's surface. The general area of the Field is rural rice and cattle land. Near the geographic center of the Appling Field, however, there is a small area which, many years prior to the discovery of gas in the Field, was subdivided into small town lots of small fractions of an acre, most of which are only 50 by 100 feet in dimension. This town lot area is known as the Carancahua Beach Townsite. Although the townsite was never actually developed as such, the numerous lots were sold to various persons.

Under Texas law and regulations of the Railroad Commission, the governmental body to which the Texas legislature has delegated the authority to regulate oil and gas production, a gas well may not ordinarily be drilled on a tract less than 320 acres. However, certain exceptions to this statewide spacing rule are granted by the regulatory agency where the surface has been divided into smaller tracts prior to oil or gas discovery in a particular area. When such an exception is granted a permit is issued by the agency to drill a well on a tract smaller in size than

---

[3] Petitioners are Aluminum Company of America (Alcoa), its wholly owned subsidiary, Lavaca Pipeline Company (Lavaca), and Crown Central Petroleum Corporation (Crown).

[4] Respondents are Woods Exploration & Producing Co., Inc., (Woods Exploration), Stanley C. Woods (Woods), the owner of Woods Exploration, and Southeastern Pipeline Company (Southeastern), a corporation owned by Woods and his wife. Stanley C. Woods and the Exploration & Producing Co. are collectively referred to as Woods respondents.

required by the statewide spacing rule. This is what occurred in the Appling Field. Petitioners were conducting operations on normal, large tracts while Respondents were drilling wells in and producing gas from the small town lots in the Carancahua Beach Townsite.

The salient fact which should be kept in the forefront is that natural gas is fugitive in nature, i.e., it does not remain in one place in a reservoir once the reservoir has been tapped. It flows or migrates from beneath the land where it was originally in place to the nearest escape to the surface via a well. Thus a well on a small tract can drain gas from surrounding acreage without regard to the amount of gas originally in place beneath the surface of that tract.

In 1949 Alcoa and Crown entered into normal oil and gas industry joint operation arrangements covering an area in which both owned interests including the territory which subsequently became known as the Appling Field. Thereafter, based upon geological data prepared by Crown engineers, Alcoa conducted seismic explorations in the Appling Field and confirmed the desirability of the area as a drilling prospect. Alcoa then obtained leases from F. E. Appling, a large land owner in the area, and engaged him to obtain oil and gas leases from other landowners. Appling retained the usual royalty interests in the leases of his own property and also an overriding royalty interest in the leases of other property obtained by him for Alcoa. The discovery well in the Appling Field was drilled jointly by Alcoa and Crown under their joint operating agreement in 1954. Thereafter, Alcoa and Crown proceeded to develop the field. Once the potential of the area was thus proven, the State of Texas held lease sales on the submerged lands of the State beneath Lavaca Bay within the Field. Alcoa, on its own and without participation by Crown, paid the

State of Texas over $1,000,000 for leases in Lavaca Bay which lay within the productive area. By the time of the first activity of drilling on the small town lots in the Carancahua Beach Townsite in 1957, Alcoa for its own account, and Alcoa and Crown for their joint account, had approximately 85 percent of the 4,000 acre surface of the Appling Field under lease.

Alcoa caused its wholly-owned subsidiary, Lavaca Pipeline Company, to transport gas from the surrounding area to its aluminum smelter located at Point Comfort, Texas, where the gas was, at least partially, consumed as plant fuel. Lavaca constructed a pipeline into the Appling Field for the sole purpose of transporting Alcoa's gas and the gas of its joint interest owners to Point Comfort. At no time did Lavaca purchase gas from anyone in the Appling Field nor did it transport gas belonging to anyone other than Alcoa, Crown and Pocantico, another joint interest owner which is not a party to this suit.

In 1959, for the first time, Respondent Woods became interested in the Appling Field. He was aware of the entire situation as it stood at that time. Woods obtained leases on a number of town lots in the Carancahua Beach Townsite, each of which was approximately 50 by 100 feet in dimension.

About the time of the advent upon the Appling Field scene of Woods, Alcoa, Crown and Pocantico began to seek the protection of the Railroad Commission of Texas and the courts of the State in an effort to protect their property by preventing massive drainage of gas from beneath their leases by wells drilled on the 50 by 100 feet town lots by Respondents and others. The course of this litigation is set forth in some detail in the opinions below and is completely evidenced by the decisions of the Texas courts in cases between these same parties involving this same gas

field set forth in the Appendix. In this litigation, the Texas courts found as a fact that Respondents had drained away and confiscated huge quantities of gas from the Appling Field lands of Alcoa and Crown.

Benz-Stoddard v. *Aluminum Co. of America,* supra (Appendix p. 140), found such drainage but nevertheless permitted Woods and others to make multiple completions in different gas bearing sands located at different levels by permitting completions at such different levels within the same well. *Railroad Commission* v. *Aluminum Co. of America,* supra (Appendix p. 131), found that the Railroad Commission's allocation formula under which it was prorating the monthly gas production allowable fixed by it for the Appling Field among the various wells in that field on the basis of one-third on a per well allotment and two-thirds on a per acreage allotment resulted in the drainage by Woods Respondents of tremendous amounts of Alcoa's and Crown's gas and that such would be unlawful confiscation but for the fact Alcoa and Crown were held barred by laches from attacking it. *Railroad Commission* v. *Woods Exploration & Producing Co.,* supra (Appendix p. 97), found that the vast drainage of Alcoa's and Crown's gas in the Appling Field by Woods previously found in the earlier cases had not only been continued but had also been substantially aggravated but that the Commission's attempt to reduce this drainage by limiting gas production allowables to maximum well productive capacity was not permissible because the statute required the allowables to be fixed on the basis of market demand.

Woods formed Southeastern Pipeline Company to transport gas from the Woods' wells in the Appling Field to the pipeline of Tennessee Gas (now Tenneco) and successfully completed that line and began production and transportation of gas from the Woods' wells on January 1, 1961.

Thereafter, the Woods Respondents produced from such wells all of the gas which they were permitted to produce by the Texas Railroad Commission and in fact more than the gas production allowables granted them permitted. Indeed, Respondents' town lot wells exhausted all of the gas which they were economically and physically able to produce by the just described drainage of surrounding large tracts of Alcoa and Crown. All of this gas was sold to Southeastern which transported it to the Tenneco line which further transmitted it to Southeastern's customer, Bayou Hydrocarbons Company, in Houston, Texas. In this transaction, Southeastern experienced a sizeable profit.

Neither the sale of gas by the Woods Respondents to Southeastern, the sale by Southeastern to Bayou Hydrocarbons, nor the sale by Alcoa, Crown and Pocantico to Houston Pipeline Company was an interstate sale. All such sales were intrastate sales outside the jurisdiction of the Federal Power Commission.

Southeastern purchased no gas in the Appling Field other than that of Woods. Lavaca purchased no gas in the Appling Field. It merely transported the gas owned by Alcoa, Crown and Pocantico to Point Comfort for plant fuel and for processing and sale to Houston Pipeline Company by its various owners.

At the time this suit was originally filed in December, 1962, and up until the filing of the Second Amended Complaint, Respondents made no complaint of any injury other than that claimed to have resulted from the limitations imposed upon the production from the Woods Respondents' wells by the monthly production allowable orders of the Railroad Commission of Texas.

The sole original claim of Respondents in the original complaint in this case was that the amounts of gas which

the Railroad Commission permitted Respondents to produce from the Appling Field were reduced by the conspiratorial conduct of Petitioners inducing the regulatory agency to grant reduced allowables. The allegation was that the Railroad Commission employs a somewhat mechanical process in determining the total production from a gas field which will be allowed in a given month. This amount of production is called the field "allowable." Respondents alleged that the monthly field allowable is determined simply by taking the total of the monthly forecasts of production filed by each producer in the field. Such forecasts are known as producers' forecasts or "nominations". Respondents claimed that Alcoa and Crown falsely understated their nominations to the Railroad Commission to cause a smaller field allowable to result so that the Woods wells would receive a smaller well allowable and thus would be permitted to produce less gas than if Alcoa and Crown had nominated the amount of gas which they actually produced and sold. Respondents made no complaint to the Railroad Commission about the alleged undernominations and sought none of the statutory remedies available there but the Commission had full knowledge of the controversy between Petitioners and Respondents and of all of the production facts and facts of drainage by Respondents of Petitioners' gas which were fully developed in the previously described litigation to which it was a party.

Alcoa and Crown moved for summary judgment based upon the rationale of the decisions of this court in *United States* v. *Rock Royal Co-Op, Inc.*, 307 U.S. 533 (1937); *Parker* v. *Brown*, 317 U.S. 341 (1943); *Eastern Railroad Presidents Conference* v. *Noerr*, 365 U.S. 127 (1960); and *United Mine Workers* v. *Pennington*, 381 U.S. 657 (1965), that injury which results from governmental regulations, orders, or action is not compensable under the Sherman

and Clayton Acts and that joint action to bring about governmental action which favors some competitors over others is not unlawful although misleading or even false information is employed with the intent of obtaining the governmental action sought to the injury of competitors. The trial court granted partial summary judgment covering the claim based on alleged undernominations to the Railroad Commission to Petitioners of these grounds. *Woods Exploration & Producing Co., Inc.*, v. *Aluminum Company of America*, 284 F. Supp. 582, Appendix p. 1.

Thereafter, the trial court proceeded to try the case before a jury upon allegations which had been added for the first time to the second amended complaint filed October 20, 1965 that Petitioners harassed Woods in his operations, caused Southeastern to be required to build a segment of its pipeline needlessly, and prevented Respondents from consummating arrangements for construction of a plant to extract liquids from their gas. The transactions upon which these allegations are based occurred more than four years prior to their insertion into the Second Amended Complaint. The trial court did not submit to the jury any question as to damages based upon the failure of Respondents to construct a liquids extraction plant because the evidence merely showed that Respondents desired to enter but did not show that Respondents were sufficiently prepared to enter this new business to raise their desire to do so to the level of "business or property" within the meaning of Section 4 of the Clayton Act, 15 U.S.C. § 15. In addition, the trial court refused to admit into evidence the final and binding findings of the Texas courts or any other evidence that Respondents had drained away and confiscated large quantities of gas from Petitioners.

The case was submitted to the jury on special interrogatories. The jury found in answer to Question No. One that

Alcoa and Crown had not entered into "an illegal contract, combination or conspiracy to unduly and unreasonably restrain the trade or commerce of drilling for, producing and transporting gas from the Appling Field."

In direct conflict with their finding that Alcoa and Crown had not entered into a combination or conspiracy to restrain drilling for, producing and transporting gas in the Appling Field, the jury found that they had monopolized, attempted to monopolize, or conspired with others to monopolize some appreciable part of "the trade or commerce of drilling for, producing, and transporting gas from the Appling Field" and found various amounts of damages as a result of the Court's instructions.[5]

Respondents moved for judgment on the verdict. Petitioners also so moved with an alternative motion for judgment notwithstanding the verdict. The trial court concluded that the case should not have gone to the jury, denied Respondents' motion and entered judgment for Petitioners. *Woods Exploration & Producing Co., Inc.* v. *Aluminum Company of America,* 304 F. Supp. 845, Appendix p. 25.

The Court of Appeals reversed both decisions of the trial court, reinstated the jury verdict as final on liability issues and damages on one part of the case and remanded the case for separate trial on the two parts of the case pertaining to the alleged filing of false nominations to the Railroad Commission by Alcoa and Crown and damages resulting therefrom and pertaining to Respondents' desires to construct a liquids extraction plant and damages arising from the failure to accomplish that desire. *Woods Exploration & Producing Co., Inc.* v. *Aluminum Company of America,* Appendix p. 38.

---

[5] The entire verdict is set out as footnote 3 to the opinion of the Court of Appeals. Appendix p. 41.

REASONS FOR ALLOWING THE WRIT

The decision of the Court of Appeals warrants review on certiorari for several reasons:

I. The reversal of the partial summary judgment based upon the governmental action of the Railroad Commission is in direct conflict with the decisions of this Court in *United States* v. *Rock Royal Co-Op, Inc.*, 307 U.S. 533 (1939); *Parker* v. *Brown*, 317 U.S. 341 (1943); *Eastern Railroad Presidents Conference* v. *Noerr*, 365 U.S. 127 (1960); and *United Mine Workers* v. *Pennington*, 381 U.S. 657 (1965). In addition, such reversal conflicts with the decision of the United States Court of Appeals for the Fourth Circuit in *Washington Gas Light Co.* v. *Virginia Electric & Power Co.*, No. 14,605, Slip opinion dated February 12, 1971, 1971 CCH Trade Cases ¶ 73,469, and that of the Court of Appeals for the D. C. Circuit in *Association of Western Railways* v. *Riss & Co.*, 299 F.2d 133 (1962), as well as with the Court of Appeals for the Fifth Circuit's own decision in *Okefenokee Rural Electric Membership Corp.* v. *Florida Power & Light Co.*, 214 F.2d 413 (5th Cir. 1954).

II. In reinstating the jury verdict as final on liability and damages as to part of the case, and remanding the cause for trial on liability issues and additional damage issues as to two other parts of the case, the Court of Appeals holds without evidence and without precedent as a matter of law as to the part of the case where the jury verdict is reinstated that the Appling Field, which is not a market at all, is the appropriate relevant market in which to test the monopolistic power of Petitioners to determine the existence of monopoly, attempted monopoly

or conspiracy to monopolize in violation of Section 2 of the Sherman Act, 15 U.S.C. § 2.

III. In reinstating the jury verdict as final on liability and damage issues on one part of the case and in effect reversing and remanding two other parts of the case for separate trial on liability issues and additional damage issues, the Court of Appeals has so departed from the accepted and usual course of judicial proceedings that supervision and review are required in that Petitioners are effectively denied a jury trial *on the whole case* and in that the jury made the reinstated damage finding of almost $150,000.00 before trebling without having been permitted to hear the excluded final court findings or other evidence on drainage which may well have resulted in a finding of no damages at all to Respondents. Consequently, if parts of the case are to be remanded for trial, then *Petitioners are at least entitled to a jury trial on the entire case.*

ARGUMENT

I.

The Decision Below Permitting Antitrust Recovery For Government Action and Inducing Government Action Conflicts With Decisions of This Court and Those of the Courts of Appeals For the Fourth and District of Columbia Circuits.

In its decisions in *Noerr, Pennington, Parker* v. *Brown,* and *Rock Royal Co-Op,* this Court has clearly defined the application of the antitrust laws to joint action by business entities to bring about governmental action which has or may have an injurious effect on competitors of those seeking the governmental action. The rule is that where the

injury suffered is the result of regulations imposed by governmental regulation or order, such injury is not remediable under the antitrust laws. This is the teaching of *Parker* v. *Brown* and *Rock Royal Co-Op.*

In *Parker* v. *Brown* this court upheld in the face of antitrust attack the California agricultural proration program governing the production and sale of raisins in accordance with a quota system established upon proposals by producers much like gas production nominations to the Texas Railroad Commission stating:

> "The state in adopting and enforcing the prorate program made no contract or agreement and entered into no conspiracy in restraint of trade or to establish monopoly but, as sovereign, imposed the restraint as an act of government which the Sherman Act did not undertake to prohibit." 317 U.S. at 352.

In *United States* v. *Rock Royal Co-Op,* a milk marketing order promulgated by the Secretary of Agriculture under the Marketing Agreement Act of 1937 was attacked as having been obtained by improper influence on the part of certain large milk cooperatives and on the further ground that the order achieved and was intended to achieve a monopoly on behalf of such cooperatives in violation of the Sherman Act. The trial court found that a combination of large cooperatives had used improper influence in obtaining the order and that the combination of cooperatives further carried out a conspiracy to obtain a monopoly through coercive activities consisting of threatened boycotts of milk handlers by producers controlled by the large cooperatives. In holding that the Sherman Act was not violated, the Court said:

> "These associations of producers of milk have a vital interest in the establishment of an efficient marketing system. This adequately explains their interest

> in securing the adoption of an order believed by them to be favorable for this purpose. If ulterior motives of corporate aggrandizement stimulated their activities, their efforts were not thereby rendered unlawful. If the Act and Order were otherwise valid, the fact their effect would be to give cooperatives a monopoly of the market would not violate the Sherman Act or justify the refusal of the injunction". 307 U.S. at 559.

The necessary corollary to the rule is that where alleged injury is suffered as a result of a governmental act or order, those who procured the governmental action or order are not liable for the result. This was made clear by the decision of this Court in *Noerr* and *Pennington,* which followed *Parker* v. *Brown* and *Rock Royal Co-Op.*

Noerr established that even though concerted action of a combination of competitors has the purpose and effect of injuring and restraining other competitors at whom the action is aimed and even though the concerted action involves the use of misrepresentation and deception, a combination seeking in concert to influence governmental action does not constitute a violation of the Sherman Act. In *Noerr,* the defendant railroads and others combined to foster the adoption of laws and administrative practices which would be destructive of the competing trucking interests. The railroad combination resorted to the deception of a third party technique in circulating propoganda that appeared to be the action of independent unselfish groups but which in fact was directed and inspired by the railroad combination. The railroad combination's action included persuading a governor to veto a bill favorable to the trucking industry and influencing the policies of transportation administrative agencies through misrepresentation. The trial court found that the railroads' "publicity campaign, insofar as it was actually directed at law making and law enforcement authorities, was malicious and fraudulent—malicious in that its only purpose was to de-

stroy the truckers as competitors, and fraudulent in that it was predicated upon the deceiving of those authorities through the use of the third party technique; and, secondly, that the railroads' campaign also had as an important, if not overriding purpose, the destruction of the truckers' good will, among both the general public and the truckers' existing customers, and thus injured the truckers in ways unrelated to the passage or enforcement of law". In a unanimous decision reversing the judgment for the plaintiff, this Court held that the combination of railroads to influence governmental action could not constitute a violation of the Sherman Act stating:

> "We accept, as the starting point for our consideration of the case, the same basic consideration of the Sherman Act adopted by the courts below—that no violation of the Act can be predicated upon mere attempts to influence the passage or enforcement of laws. It has been recognized, at least since the landmark decision of this Court in Standard Oil Co. of New Jersey v. United States, that the Sherman Act forbids only those trade restraints and monopolizations that are created or attempted, by the acts of 'individuals or combinations of individuals or corporations'. Accordingly, it has been held that where a restraint upon trade or monopolization is the result of valid governmental action, as opposed to private action, no violation of the Act can be made out. (Citing United States v. Rock Royal Co-Op., 307 U.S. 533, 83 L.Ed. 1446, and Parker v. Brown, 317 U.S. 341, 87 L.Ed 315). These decisions rest upon the fact that under our form of government the question whether a law of that kind should pass, or if passed be enforced, is the responsibility of the appropriate legislative or executive branches of government so long as the law itself does not violate some provision of the Constitution.
>
> "We think it equally clear that the Sherman Act does not prohibit two or more persons from associat-

> ing together in an attempt to persuade the legislature or the executive to take particular action with respect to a law that would produce a restraint or monopoly."

In *Pennington* this Court indicated the vitality and breadth of the rule of *Noerr* by holding that a conspiracy between large coal producers and the Mine Workers Union to persuade the Secretary of Labor to take action detrimental to small coal producers was not actionable under the Sherman Act even if a part of a larger over-all conspiracy. In so holding, this Court said:

> "There is another reason for remanding this case for further proceedings in the lower courts. It is clear under Noerr that Phillips could not collect any damages under the Sherman Act for any injury which it suffered from the action of the Secretary of Labor. The conduct of the union and the operators did not violate the Act, the action taken to set a minimum wage for government purchases of coal was the act of a public official who is not claimed to be a co-conspirator, and the jury should have been instructed, as UMW requested, to exclude any damages which Phillips may have suffered as a result of the Secretary's Walsh-Healey determinations." 381 U.S. at 671.

As significantly pointed out by the trial court in this case, Appendix p. 16, this Court, in *Pennington,* cited with approval the decision of the Court of Appeals for the Fifth Circuit in *Okefenokee Rural Electric Membership Corp.* v. *Florida Power & Light Co.,* 214 F.2d 413 (5th Cir. 1954), in which the Sherman Act was held not to apply to a situation in which the defendants made a false representation to the State Road Department that there was already a power line serving the area in order to prevent the issuance of a permit to a competitor to build a power line down a county road to serve such area.

The Court of Appeals in the case at bar attempts to circumvent the clear mandate of the decisions of this Court and, indeed its own decision in *Okefenokee,* by ignoring the undisputed fact that the orders of the Railroad Commission limiting production in the Appling Field were valid state action and basing its decision on the assertion that the filing of false nominations alone renders the alleged injury suffered actionable under the Sherman Act.

A disagreement with the scope of the *Noerr-Pennington* principle permeates the Court of Appeals' opinion. It seeks by a grudging and miserly construction to limit the principle to instances where representations to government agencies made to induce particular government action are true and accurate. The Supreme Court recognized no such limitation in *Noerr* when it expressly declared that "falsehood, however reprehensible" did not bring representations to influence governmental action within the antitrust ambit. The Fifth Circuit itself repuditaed any such exception in its own *Okefenokee* decision, cited with approval in *Pennington,* where a false representation that a power line already served the area made to the State Road Department when the line in fact was a "dummy line" did not permit antitrust recovery by a competitor who was denied a permit to build a line on a road to serve the same area because of the false representation. *Okefenokee* is utterly undistinguishable on any rational basis from the claimed false forecasts of market demand held antitrust actionable here. The Fifth Circuit again strains at this distinction in its subsequent decision in No. 30091, *Gas Light Co. of Columbus* v. *Georgia Power Co. and The Southern Co.,* Slip opinion dated March 23, 1971, No. 506 ATTRR-1, in which it seeks to distinguish fixing anticompetitive electric rates by electric utilites with regulatory commission approval, given *Parker* v. *Brown* and *Noerr-Pennington*

immunity, from the present case on the ground that it here "refused to characterize as state action the regulation of production of natural gas by the Texas Railroad Commission, since plaintiffs alleged that defendants filed false information with the Commission." The truth is that the Court of Appeals has attempted to carve out an exception of its own creation to the *Parker* v. *Brown/Noerr-Pennington* rule by making its applicability hinge on the truth or falsity, accuracy or inaccuracy, of representations made to government agencies to induce government action. It further, by an exception of its own origination, would carve out "administrative adjudicative" government actions and confine the rule to legislative and policy-making actions. This attempted erosion of the doctrine by whittling away at it seemingly invites the Supreme Court to retreat from the rule as it has heretofore asserted it. Even if the nominations filed with the Railroad Commission by Petitioners were false, the rule of *Rock Royal Co-Op* and its progeny through *Pennington* requires a holding that injury suffered as a result of the orders of the Commission based upon such nominations is not within the Sherman Act.

The Court of Appeals asserts that the filing of false nominations by Petitioners placed them in the position of the "real decision makers". In so asserting, the Court of Appeals ignores the undisputed facts as set forth in the opinion of the trial court, Appendix pp. 7-8, and the undisputed facts set forth in the three previously discussed opinions of the Supreme Court of the State of Texas, that producers' forecasts or nominations were, in fact, ignored by the Commission in the setting of allowables in the Appling Field. In so asserting, the Court of Appeals ignored uncontroverted evidence which was before the trial court on motion for summary judgment that the Railroad Commission was fully cognizant of the unrealistically high

nominations filed by Respondents and other town lot operators, and had monthly reports of actual production from all producers in the Field which, instead of nominations, were used by the Commission in establishing allowables. It had full knowledge of all that transpired in the Appling Field demonstrated by the previously described litigation to which it was a party involving Commission orders in the Field as shown by the three state court opinions contained in the Appendix.

This knowledge on the part of the Commission brings the decision of the Court of Appeals into direct conflict with that of the Court of Appeals for the Fourth Circuit in *Washington Gas Light Co.* v. *Virginia Electric & Power Co.*, No. 14,605, slip opinion dated February 12, 1971. In that case the Court of Appeals holds that where conduct of an antitrust defendant is regulated by a state agency and where the plaintiff's alleged injury is the result of regulation by the state agency or its knowing inaction against the complained of conduct, the claimed damages are the result of state action and not recoverable under the Sherman Act. The court points out that where the conduct of the defendant complained of is subject to regulation by a state agency, the plaintiff should first give that agency the opportunity to rectify the situation by regulation much as in the fashion where primary jurisdiction of a regulatory agency requires reference of a controversy to that agency prior to adjudication in a court. *Carter* v. *American Telephone & Telegraph Co.*, 365 F.2d 486 (5 Cir., 1966).

The action of the Railroad Commission in setting allowables in the Appling Field is state action regardless of its basis. In conflict with the opinion of the Fifth Circuit below, however, the Fourth Circuit makes it clear that state action would be present even when the regulatory agency did not act. It must be concluded, however, that by basing

allowables upon production figures rather than nominations, the Railroad Commission did knowingly act and the result of that action cannot be the subject of antitrust recovery particularly in view of the fact that Respondents never sought any other action by the Railroad Commission. Under the pervasive regulatory scheme established by the provisions of Art. 6008 of the Texas Statutes found in the Appendix Respondents had a complete remedy on every complaint concerning false nominations by Petitioners before a regulatory agency broadly empowered to deal with the matter. They never availed themselves of this recourse for the obvious reason that the Commission was already keenly aware of Respondents' ravaging of Petitioners' gas reserves through aggravated drainage and would not likely respond to any effort by Respondents to compound the offense by procuring still increased drainage through increased gas production allowables.

The conflict between the decision below and that of the Court of Appeals for the District of Columbia in *Riss* is clear and need not be expanded upon in that in *Riss*, the Court of Appeals followed and relied upon the decision of this Court in *Noerr* in a case almost identical on the facts to that presented in *Noerr*.

To resolve the conflict between the decisions of the Courts of Appeals and the conflicts of the decision below with the ruling decisions of this Court, the writ should issue and the decision of the trial court should be affirmed.

II.

Piecemeal Retrial of Damage Issues Based Upon A Holding As A Matter Of Law That The Appling Field Is The Relevant Market Requires Supervision and Review.

The decision of the Court of Appeals that this single, small gas field in which no gas was marketed is the appropriate relevant market *as a matter of law* for a Section 2 Sherman Act monopoly is an alarming precedent disastrous to the essential economic realities of the oil and gas industry. Such holding is not only totally without supporting precedent but is also in cavalier disregard of the basic economic and legal structure of the industry, which is the blocking together of a sizeable number of contiguous leases covering substantial acreage by a single company or joint venture as required for the economic and physical feasibility of the necessary geological and geophysical studies, financing, exploratory drilling, development drilling, production, transportation, and marketing indispensable to the discovery and development of a natural gas field all in a highly regulated program in which every well must be located, spaced and drilled in accordance with a Railroad Commission permit, completed and operated under regulations adopted by the regulatory agency and under field rules issued by it for the particular gas field, and with all production being in allowable amounts allocated to each well by the state authority under a system of full reporting to and inspection and supervision by the governing body. Art. 6008, Texas Statutes (Appendix p. 147). The consequence is that most gas fields are owned in whole or in large part by a single company or a small group of joint operators as the inevitable result of economic and physical necessity and state regulation. This

decision renders literally hundreds of them likely Section 2 monopolies.

As is clear from the opinions below, the trial court's instructions and form of verdict assumed that the Appling Field was the appropriate relevant market. On post verdict motions, the trial court held that this was erroneous. The Court of Appeals reversed the trial court and held as a matter of law that the Appling Field was the appropriate relevant market. It is respectfully submitted that the post-verdict ruling of the trial court was correct because the undisputed evidence and all of the evidence on the subject was to the effect that the Appling Field is not a market at all, either relevant or irrelevant, because gas produced from the Field was not sold in the Field. The gas from the Field was sold in the Houston, Gulf Coast area in competition with vast quantities of gas from other areas brought to that general area from elsewhere by numerous pipelines which provide easy access for gas from point of production to the market just as most gas fields find their market in a distribution area or at an interstate gas pipeline removed from the gas field.

Despite the not only apparent but real and hopeless conflict in the answers of the jury to Questions One and Two, which renders the verdict incapable of supporting any judgment, the Court of Appeals has reinstated the verdict of damages based upon the finding of the jury that Alcoa and Crown monopolized or attempted to monopolize, or conspired with others to monopolize an "appreciable part of the trade and commerce of drilling for, producing and transporting gas from the Appling Field." As a base for this holding, the Court of Appeals equates production of gas in this Field with "any part of the trade or commerce among the several states," 15 U.S.C. § 2, and finds as a matter of law that the Appling Field as such

is therefor the appropriate relevant market and states that the jury was entitled to believe that the Defendants had monopolized that "market." Thus the court below evades any concept of a market which heretofore has been the essential matrix in which a Section 2 violation must be found.

The controlling decisions of this Court have consistently held that monopolization under Section 2 of the Sherman Act requires proof that establishes the present existence of such market domination that the monopolist has "the power to control prices or exclude competition". *United States* v. *Grinnell Corp.*, 384 U.S. 563, 571 (1965). In *Grinnell* this Court elaborated:

> "The offense of monopoly under Section 2 . . . has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen or historical accident.
>
> • • •
>
> "In United States v. E. I. Du Pont de Nemours & Co., 351 U.S. 377, 396, 391, we defined monopoly power as 'the power to control prices or exclude competition.' The existence of such power ordinarily may be inferred from the predominant share of the market."

There has never been any claim that Alcoa and Crown possessed or exercised any power over prices of gas from the Appling Field. The uncontroverted evidence in this case shows a total lack of power to exclude competition because it established that Respondents produced, transported and marketed all of the gas which was legally permissible and physically possible from their wells in the Appling Field.

Further, the Appling Field under the undisputed evidence totally fails to meet this Court's further test of the appropriate relevant market as "the area of effective competition" when under the undisputed evidence *there was no competition at all* in the marketing of gas there because none was sold there. *Standard Oil Co. of California and Standard Stations* v. *United States*, 337 U.S. 293, 299 (1949).

The sum and substance of the decision below is that Petitioners have been convicted of monopolization, or an attempt or conspiracy to monopolize the Appling Field, on a reinstated jury finding by a jury that was instructed that the Appling Field was the subject of the violation. The relevant geographic market in this case has been established merely by the ipse dixit of Respondents without proof of restriction upon competition but with the approval of the Court of Appeals.

The absence of proof by Respondents of any monopolistic power in Petitioners in any market and the fact that under the undisputed evidence the Appling Field cannot be the appropriate relevant market entitle Petitioners to judgment. Petitioners, even if it be deemed that there is *some* evidence that the Appling Field is the relevant market, are at the very least entitled to a jury trial on the issue of what constitutes the relevant market and the propriety of their conduct therein. *Case-Swayne Co.* v. *Sunkist Growers, Inc.*, 369 F.2d 449, 456, 459, *cert. denied on monopolization issues*, 387 U.S. 932 (1967).

III.

Fragmenting the Case into Three Parts and Remanding Two Parts for Separate Trial Denies Petitioners a Jury Trial on the Whole Case and Constitutes Such an Abuse of Established Judicial Practice and Procedure as to Require Supervision and Review.

It is developed in I that the *one part of the case* involving injury from the governmental action of the Texas Railroad Commission allegedly induced by Petitioners is remanded for separate trial on issues of liability and damages. It is developed in II that, despite the fact that the case was submitted to the jury as a *whole* case for which the jury found *total* damages, the Court of Appeals seeks to reinstate the jury verdict as final only as to a *second part* of the case relating to monopoly, attempted monopoly or conspiracy to monopolize the Appling gas field as solely related to the alleged unnecessary construction by Respondents of a pipeline with the total damages found by the jury being attributed by the Court of Appeals to this part of the case only. The opinion below evidently seeks to finalize and segregate the damage award as to this part of the case only, disregarding the fact that the partial summary judgment on the first part of the case resulted in the exclusion from the jury of the evidence and the final state court findings of vast drainage by Respondents of Petitioners' gas, which goes to wipe out any damages in the *whole case*—including the part as to which the court seeks to allocate and affirm the damages found by the jury.

As a final part of the novel fragmentation process, the Court of Appeals further remands a *third part of the case* involving the alleged frustration by Petitioners of Re-

spondents' desire to enter a new business by constructing a liquids extraction plant in the Appling Field for separate trial on liability and damage issues. If the extraction plant is a separate cause of action, it is long since barred by the four-year limitation statute because over four years elapsed between the occurrence and Respondents' first mention of it in their Second Amended Petition. 15 U.S.C.A. 15b. If it is merely an evidentiary part of the original cause of action, it cannot be separately tried and separate damages accorded to it as a separate case. To do this would not only be repugnant to any known federal judicial procedure but taken with I and II would also effectively deny Petitioners a jury trial on the *whole case.*

The one case cannot be splintered into three inter-related parts and tried as if they were three separate and distinct cases. The part about the pipeline cannot be severed from the part about the extraction plant and separate damages be awarded for each when there is only one cause of action, one claimed Section 2 violation, and one injury —though perhaps separate elements of single damages. Neither can the part about nominations for gas production allowables to the Texas Railroad Commission which is remanded for trial be separately tried from the other two parts, because the excluded evidence on final state court findings of tremendous drainage of Petitioners' gas by Respondents relates to all three—to *total single damages for the whole case.* See *Magenau* v. *Aetna Freight Lines, Inc.,* 360 U.S. 273, 279 (1959), where this Court ordered "a new trial on the whole case" because the "disputed issues are so interrelated with the ultimate issues of liability and damages that a limited hearing would not be in the interest of fairness and efficiency in judicial administration."

Not only does the Court of Appeals deny Petitioners a proper jury trial and reinstate the damage verdict based upon the erroneous holding that the Appling Field is a

relevant market, but it sends the case back for trial presumably to determine both liability issues and additional damages based upon the extraction plant. The record in the trial court will demonstrate that not only the damages found by the jury but those ordered to trial on the extraction plant were based primarily upon a claimed agreement between Respondents and Lumar Pipeline Company for joint use of facilities and the possible construction of a liquids extraction plant. The undisputed evidence was that there was no such agreement and that the document introduced by Respondents as evidence of the claimed agreement was a "crude, amateurish, traced forgery" of the signature of the President of Lumar and the jury so found by its answer to Question No. Four. This part of the case is remanded for trial despite this fictional basis for Respondents' claims, and despite the fact that the transactions upon which the claim is based were not complained of until after limitations had expired.

It is arguable that the court below remanded this third part of the case for a trial to determine only the amount of additional damages arising out of the failure of Respondents to achieve their desire of constructing the liquids extraction plant pinning such trial to the reinstated answer of the jury to Question No. Two and the court's own holding as a matter of law that the Appling Field was the appropriate relevant market which had been monopolized by Petitioners. On this construction it is inconceivable that Respondents can be awarded two separate and cumulative damage awards in two separate trials on the same cause of action based on the same Section 2 violation in the same relevant market on the basis of two separate evidentiary damage elements for the same injury. It seems elementary that if the reinstated damage award is affirmed, all damages are thereby determined. If the extraction plant part is remanded, all damages must be remanded.

CONCLUSION

This seems to be a clear case for certiorari for three strong, solid reasons:

(1) The remand for trial on the claimed insufficiency of Respondents' gas production allowables granted by the state regulatory agency and allegdly induced by Petitioners is a patent evasion of *Noerr*, a deviation from *Pennington* and a repudiation of *Okefenokee*.

(2) The reinstatement of the jury verdict predicated on the Court of Appeals finding as a matter of law that the single gas field constituted the relevant market for Section 2 monopoly purposes although no gas was sold in the field is not only completely unprecedented but is a drastic and dangerous departure from fundamental judicial concepts on the determination of relevant market.

(3) The fragmentation of a single cause of action predicated on a single alleged Section 2 violation as to a single gas field into *three parts*, as to *one* of which the Court of Appeals assigns the reinstated jury findings including damages, and the other two of which are remanded for severed and separate trial, not only effectively denies Petitioners a jury trial on *single* damages as to the *whole* of *one* case and assesses partial damages to one part of the case on the basis of a finding by a jury that never heard the drainage evidence that goes to damages on the whole case or any phase of the case, but constitutes a radical and revolutionary disruption of established judicial practices and procedures.

In the course of arriving at these three astounding consequences the Court of Appeals has effectively scorned the successive findings of the Supreme Court of Texas that these Respondents have drained and confiscated enormous

stores of these Petitioners' gas in this same gas field during the course of and as a part of this same controversy. The result rewards the ravishing of the reserves of gas owned by Petitioners by according Respondents the accolade of a treble damage bonanza as premium for the plunder. This shocking subversion of simple justice at the least constitutes an arrant abuse of the treble damage remedy and of the judicial process which affords it.

The petition should be granted, the judgment of the Court of Appeals reversed and the judgment of the trial court affirmed.

Respectfully submitted,

.....

JOHN LEROY JEFFERS
First City National Bank Building
Houston, Texas 77002

Attorney for Petitioners Aluminum Company of America, Crown Central Petroleum Corporation, Lavaca Pipeline Company

Of Counsel:

ROSS N. STERLING
ROBERT E. MORSE, JR.
CHARLES T. NEWTON, JR.
VINSON, ELKINS, SEARLS & SMITH
First City National Bank Building
Houston, Texas 77002

CERTIFICATE OF SERVICE

I hereby certify that pursuant to Rule 33, paragraph 1, of this Court, three copies of the foregoing Petition for Writ of Certiorari and separate Appendix thereto were served upon Counsel for Respondents by placing the same in the United States mail, first class postage prepaid addressed to counsel of record for Respondents at his post office address this ..... day of May, 1971, thus serving all parties required to be served.

.....

John Leroy Jeffers
First City National Bank Bldg.
Houston, Texas 77002
Counsel for Petitioners